SUPREME COURT, U. S.

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No. 73-654

In the Supreme Court of the United States

OCTOBER TERM, 1973

TRI-STATE STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 37-44) is reported at 477 F. 2d 204. The Board's decision and order (Pet. App. B, pp. 52-79) are reported at 185 NLRB 829.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1973 (Pet. App. A, pp. 46-49). The petition for a writ of certiorari was filed on Monday, October 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the company restrained and coerced its

employees in the exercise of their organizational rights, discharged an employee because of her union activity, and refused to bargain with the union though it represented a majority of the employees in an appropriate unit.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 4.

STATEMENT

A. The Board's Findings of Fact

1. *Restraint and Coercion*

In August 1969,[1] the employees at petitioner's department store in Moses Lake, Washington,[2] became concerned over the prospect of polygraph testing respecting suspected pilfering and met to discuss the matter (R. 15; Tr. 264, 233).[3] Having received information about the meeting and the employee unrest, store owner Doris Connelly visited the store in an attempt to calm the employees (R. 15; Tr. 364, 257, 236). Apparently not assuaged by this visit, the employees met again on September 2 to discuss their problems (R. 15; Tr. 15, 258). Another meeting was held the following night with

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[1] All events occurred in 1969.

[2] Petitioner has a second store in Moscow, Idaho, about 100 miles away.

[3] "R." references are to Volume I of the record in the court below; "Tr." references are to the transcript of testimony in Volume II of that record; and references designated "GCX" or "RX" are to the exhibits of the General Counsel and the Respondent, respectively.

a representative from the Retail Clerks Union, Arnold Needham. Needham collected signed authorization cards from twenty-two employees that night, and obtained six more signed cards between September 4 and 9 (R. 16; Tr. 135, 139, 141; GCX 7A-V, GCX 9A-I).

On September 4, Connelly received a report about the meetings and told Store Manager Ehart and his assistant, Banks, that if the store were unionized she would close it (R. 17; Tr. 105-106, 348). She also told Ehart not to accept any demand from the Union (R. 25; Tr. 79). That same day, Buchanan, office manager of petitioner's Moscow, Idaho store, telephoned her assistant at Moses Lake, employee Ilse Iliff, and questioned her about the Union. When Iliff offered no information, Buchanan said, "There was a meeting last night," and added that she had "heard that most of the girls who were in attendance had signed cards" (R. 21; Tr. 163). Iliff still refused to admit any knowledge of union activities, and when asked "Did you sign?" falsely stated that she had not (Tr. 163). The conversation ended shortly after Buchanan announced that she was "very anti-union" (Tr. 164).

On September 6, Terri Clevenger, a management consultant sent by Connelly, arrived at Moses Lake and addressed meetings of employees (R. 16-17; Tr. 360, 361, 166, 95, 96). Clevenger stated that she wanted to find out "how everybody felt," that there were "questions coming up about raises," and that she "wanted [the employees] to be happy." She asked if they "had anything bothering [them] or that [they] would like to have done" (R. 17; Tr. 319, 168, 314, 221, 220). An employee inquired if a five-day week could be substituted for the six-day week and Clevenger replied that she "didn't know why not" (R. 20; Tr. 220).

Clevenger then went to Moscow to report to Connelly (R. 17; Tr. 317). About this time, the Company posted a notice at Moses Lake that the polygraph tests had been postponed (R. 17; Tr. 258-259).

On September 9, Clevenger returned to Moses Lake and met with department heads[4] to discuss the continuing employee unrest (R. 17; R. 406, 396). Clevenger announced, "the fat is in the fire. I just got word from Moscow * * * the doors will close if this Union deal goes through" (R. 17; Tr. 267). It was decided that the department heads would immediately solicit letters from employees repudiating their union authorization cards, and they did so (Tr. 273, 212, 219, 243-244, 247-248, 271, 275, 283-284, 294-295, 326, 403-405). One department head, Roberts, told employees that Connelly would close the store unless they wrote withdrawal letters (Tr. 212, 245, 260, 261, 219). Although only 28 employees had signed cards, 35 wrote letters to the Union stating they no longer wished it to represent them (GCX 8A-II). At the direction of a department head, employees delivered the letters to the Union (R. 18; Tr. 142, 112).

Shortly thereafter, employees who worked six days a week were rescheduled to five, although they continued to work forty hours (R. 18; Tr. 222-223). In paychecks distributed in the middle of September, 19 employees received wage increases. All but one of these employees had either written a withdrawal letter or had never signed a union card (GCX 3, GCX 8A-II).

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[4] Eloise Lehman, an employee, attended the meeting as a substitute for her department head (Tr. 265, 266).

2. *The discharge of Employee Iliff*

Ilse Iliff was an outspoken employee and had feuded with Store Manager Ehart since November 1968 (Tr. 171). On August 26, during the employee unrest over the polygraph testing, Iliff told Ehart that she wished to visit Connelly in Moscow to talk over employee grievances because Ehart was just "a puppet on a string" (R. 21; Tr. 172). Ehart pressed her for an explanation of the problems, but, when she responded, he accused her of trying to "run his business" (R. 21; Tr. 173). As set forth above, as soon as the Company learned of the meetings at Moses Lake, Iliff was interrogated by her superior, Buchanan, about the union activities, and Iliff refused to furnish any information. On Monday, September 8, four days after this interrogation, Iliff was abruptly discharged (R. 22; Tr. 191).

3. *The refusal to bargain*

On September 15, Union agent Needham visited the Moses Lake store and gave Manager Ehart a sealed envelope containing the Union's demand for recognition. When Ehart refused to accept it, Needham placed it on his desk and left (R. 24-25; Tr. 92, 81). Ehart then telephoned Connelly in Clevenger's presence. Pursuant to Connelly's instructions, Clevenger opened the letter, and read it to Connelly. The letter claimed that the Union represented a majority of the employees in the unit specified, offered to submit the Union's cards to a neutral person for checking, and proposed a meeting for September 25. The Company made no response to the letter, but filed a representation petition with the Board, alleging the existence of a question concerning representation. (R. 13, 25; Tr. 116, 94; GCX 6, RX 1.)

The Union had obtained 25 valid authorization cards in a unit admitted by the Company to be appropriate (R. 11; GCX 2). There were between 38 and 41 employees in the unit at all relevant times (R. 11; Tr. 24; GCX 2).

B. The Decisions Below

Upon the foregoing facts the Board concluded that the Company violated Section 8(a)(1) of the Act by coercively interrogating employee Ilse Iliff (Pet. App. B, pp. 61-62); threatening to close the Moses Lake store if the Union should prevail (Pet. App. B, pp. 62-63); soliciting, encouraging, and aiding its employees to revoke their Union authorization cards (Pet. App. B, pp. 63-64); and increasing wages and improving working hours to induce its employees to leave the Union (Pet. App. B, pp. 64-66). The Board also found that the Company violated Section 8(a)(3) and (1) by discriminatorily discharging Ilse Iliff because of her interest in and sympathies for the Union (Pet. App. B, pp. 68-70). Finally, the Board concluded that the Union had cards from a majority of the employees at the time of its recognition demand, that the Company's other unfair labor practices made a fair election unlikely, and that thus the Company violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union (Pet. App. B, pp. 74-75).

The Board ordered the Company to cease and desist from the unfair labor practices found, and to offer reinstatement to Iliff and make her whole for any loss of earnings. The Board also directed the Company to bargain with the Union upon request and to post the customary notices (Pet. App. B, pp. 76-79).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A, pp. 37-44).

ARGUMENT

The only issue actually presented by the petition is whether substantial evidence supports the Board's unfair labor practice findings. That factual issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the facts summarized above (pp. 2-6) show that there is ample basis for the Board's findings.

There is no merit to petitioner's contention that the court below misapplied the *Universal Camera* reviewing standard. The discharge of employee Iliff, unlike the hiring of temporary replacements in *National Labor Relations Board* v. *Brown Food Store,* 380 U.S. 278 (Pet. 20-21), was found by the Board and the court below to have been motivated by anti-union considerations. Action so motivated is "demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act" (380 U.S. at 286).

Nor is there any inconsistency between the statement in *Universal Camera* that a reviewing court may not "displace the Board's choice between two fairly conflicting views" (340 U.S. at 488), and the requirement in Section 10(c) of the Act, 29 U.S.C. 160(c), that the Board must be satisfied, "upon the preponderance of the testimony taken," that an unfair labor practice has been committed (Pet. 24-25). "Preponderance of the testimony" is the test which the General Counsel of the Board must meet in establishing an unfair labor practice before the Board. But if the Board is satisfied

that this test has been met and finds an unfair labor practice, Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, insofar as the reviewing court is concerned, the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Under the latter standard, "a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera, supra,* 340 U.S. at 488.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner's due process contention (Pet. 33) is likewise insubstantial. The Trial Examiner, whose finding the Board adopted, concluded that, "[a]lthough the complaint does not expressly allege that Clevenger was one of those who made the threat, I find that the issue was fully litigated" (Pet. App. B, p. 63, n. 11).